Supreme Court, U.S.
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NO. 86-1624

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WILLIAM WITHWORTH, LINCOLN J. STOKES, and ANTHONY J. CELEBREZZE, JR.,
Petitioners,

v.

RYAN HUNG-PING WANG,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent respectfully submits that the decision below and the factual record do not raise the questions presented for review in the Petition For Certiorari for the reasons set forth below. Should the Supreme Court decide that it may take jurisdiction, only the following questions would be presented:

1. WHETHER THE STATE MAY RETRY A CRIMINAL DEFENDANT FOR THE SAME ENHANCED FELONY OFFENSE AND IMPRISON HIM FOR THE LESSER INCLUDED MISDEMEANOR AFTER THE FIRST TRIAL IS TERMINATED BY FINDINGS AND A RULING, WHETHER CORRECT OR NOT, THAT THE STATE HAD FAILED TO PROVE THE ESSENTIAL ENHANCING ELEMENT OF THAT OFFENSE, A PRIOR COUNSELED CONVICTION.

2. WHETHER A CERTIFICATE OF THE TRIAL JUDGE UNDER 28 U.S.C. § 2245 MAY BE USED TO CHANGE THE TRIAL RECORD.

3. WHETHER THE STATE COURT'S FINDINGS AND RULINGS, WHETHER CORRECT OR NOT, OPERATED AS AN ACQUITTAL.

4. WHETHER THE STATE MAY REQUIRE A CRIMINAL DEFENDANT TO CARRY THE BURDEN OF PROOF TO SHOW THAT A PRIOR CONVICTION WAS NOT COUNSELED WHEN IT IS AN ESSENTIAL ELEMENT OF THE OFFENSE.

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Ryan Hung-Ping Wang, respectfully requests that the Supreme Court deny the Petition For Writ of Certiorari seeking review of the opinion of the United States Court of Appeals for the Sixth Circuit in this case. That opinion is reported at 811 F.2d 952 (6th Cir. 1987). Petitioners' Motion For Rehearing and for Rehearing En Banc was also denied by the Sixth Circuit. See Appendix A.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, entered on February 11, 1987, is officially reported at 811 F.2d 952 (6th Cir. 1987), and the slip opinion is attached to the Petition as Appendix A. The Sixth Circuit's Order, entered March 27, 1987, denying rehearing and rehearing en banc is attached hereto as Appendix A. The order

of the United States District Court for the Southern District of Ohio, Western Division, entered on December 27, 1985, is not officially reported, but it adopted the United States Magistrate's opinion, which is attached to the Petition as Appendix C. The Supreme Court of Ohio declined to exercise discretionary jurisdiction, by judgment but without opinion. The unreported opinion of the Ohio Court of Appeals, First Appellate District, entered January 25, 1984, is attached hereto as Appendix B.

CONSTITUTIONAL PROVISIONS AND STATUTES

The most pertinent Constitutional provisions and statutes, as well as several irrelevant ones, are included in the Petition.

STATEMENT OF THE CASE

Petitioners' statement of the proceedings in state court and facts is substantially misleading. An accurate, if abbreviated, statement may be found in the Sixth Circuit opinion, 811 F.2d at 953-55. Constitutional procedural issues of what happened in the trial court on Respondent's motions, not factual issues of guilt or innocence, comprise this case. The factual record of what occurred in the Ohio trial court is what created the legal controversy in all of the courts below: whether the trial court granted an acquittal (whether correct or not) or a mistrial. However, the Petition sets forth an attempt to prove Respondent's guilt, which is irrelevant to the Constitutional protections defined by the Sixth Circuit below. The facts which are at issue are Constitutional and procedural and relate to whether the state trial judge, whether correct or not, resolved facts in Respondent's favor and whether Respondent was twice prosecuted for the same felony theft offense, after which he was imprisoned for the lesser included offense. Contrary to Petitioners' statement of facts, the U.S. Court of Appeals determined, as a matter of fact, as well as law, that Respondent was acquitted by the state trial court. Whether the state court was correct is irrelevant.

The Petition incorrectly asserts that in Respondent's second state court trial on the felony offense, "No mention was made, nor testimony presented as to the prior offense." (Petition at 10) Petitioners wrongly imply that the reprosecution was only for the lesser included misdemeanor. As in the courts below, Respondent must again correct this misstatement, quoting directly from the record, which shows that the court itself, as well as counsel, advised the jury that the second prosecution was a felony prosecution premised upon a prior conviction. (R. 12A: Reply Memorandum In Support Of Petition For Habeas Corpus at 4; R. 14: Second Volume of Trial Transcript of Proceedings at 5) (hereinafter cited as "T.P. ____")[1] The state trial court at the reprosecution in its instruc-

[1] Respondent follows the same method of citation to the record as in the Petition, page 6, footnote 2.

tion to the jury said that the second trial was, indeed, an enhanced felony prosecution:

> [T]he charge in this case involved the theft, the allegations being that the Defendant was guilty of a theft, and *on a prior occasion was guilty of another theft. Those are the issues that will be tried.* As the facts for the jurors to determine as judges of the facts of the case. That is the nature of the case. [R. 14: 2 T.P. 5 (emphasis added)]

The Ohio Court of Appeals, moreover, explicitly interpreted the record to find that "Wang was brought to the second 1983 trial for grand theft as set forth in the indictment, not for the reduced charge of petty theft." (R. 14: doc. 44, Opinion at fn.7; Appendix B)

The Petition's purported statement of facts also fails to mention that Respondent actually served a prison term of twenty-two days of his thirty-day sentence when the State successfully opposed bail before Respondent was released on bail pending his state appeal and again during proceedings in the district court. He was briefly reincarcerated following the district court's judgment and before the Sixth Circuit granted a stay of sentence pending appeal. Thus, Respondent's felony reprosecution resulted in actual imprisonment, if that is a test of prejudice following his reprosecution on the basis of a prior uncounseled conviction.

Petitioners mischaracterize the state trial court's ruling. The trial court's complete ruling in the trial transcript is omitted by Petitioners and may be reviewed in the appendix to the Ohio Court of Appeals opinion, attached hereto as Appendix B. That record was thoroughly analyzed by the Sixth Circuit. The Petition mischaracterizes the state trial court's ruling as a mistrial when, in fact, the state trial court, as well as the Sixth Circuit, rejected that label. The state trial court labeled its ruling a "new trial". (R. 14: 1 T.P. 162; R. 14: doc. 10, Judgment Entry). The Sixth Circuit agreed with Respondent that the state court's ruling on the record and by judgment entry was not a mistrial, but an acquittal. (Petition at 8a, 811 F.2d at 957)

Petitioners would like to have this case resolved on the so-called mistrial exception to the Double Jeopardy Rule by glossing over the facts of the state court record and the rationale expressed even by the state trial court in its decision to terminate the first trial. The state trial court relied on and cited Respondent's authority for acquittal, but called its ruling a new trial. It did not grant the alternative mistrial. Although the court's label has no control over the legal effect of its ruling, the state trial court thought there was a difference. Petitioners try to make the record appear simplistic by omitting the key parts of it, citing only the entry, and thus try to evade the constitutional issues involved and applied to all the facts by the Sixth Circuit below.

Furthermore, the Petition mischaracterizes the factual basis in the record for Respondent's alternative motion for a mistrial by omission at page 8 of their brief of the essential part of counsel's motion. The complete motion for acquittal may be found at R. 14: Stipulation of Record, doc. 1: 1 T.P. 154-156, 161. Respondents' alternative motion for a mistrial (which was overruled) was expressly stated to be based, not on procedural errors such as prejudice from the number of witnesses or exhibits, but squarely on the "matters relating to the prior conviction, which at this stage of the case has not resulted in any proof of that element of the crime." (R. 14: 1 T.P. 155) Respondent was clear that all of his motions were based not on extrinsic prejudice, which might support the mistrial exception to the Double Jeopardy Rule, but on the inherent insufficiency of proof of an element of the offense charged by virtue of the State's failure to prove that the prior conviction was counseled. Nowhere in the record does it appear that Respondent made his mistrial motion solely on the ground that the "volume" of the witnesses as to the prior conviction was prejudicial. Only the Petition's selective quotation from the record presents the case in such false light.

Of course, where the State has attempted through testimony and exhibits but has failed to prove an essential element of the offense, the testimony and exhibits concerning that element are inherently prejudicial because they are ir-

relevant. The whole point of Respondent's motions for acquittal and mistrial in the first prosecution was that none of the testimony was relevant because under *Baldasar* v. *Illinois*, 446 U.S. 222, 100 S. Ct. 1585 (1980), it did not establish an element of the felony offense charged, a prior counseled conviction. Even if the State had produced only one witness testifying to the prior conviction, that testimony would have been inadmissible and inherently prejudicial unless it could also be shown that the prior conviction was counseled, for only then would the evidence be relevant as proof of an element of the felony charge.

The Petition wrongly suggests in its purported facts on page 7 that Respondent waived his double jeopardy rights by failing to appeal from the court's denial of his first motion to dismiss for double jeopardy. The record shows that the entry denying that first motion was not entered until after the second trial (R. 14: doc. 11, Judgment Entry of March 31, 1983), so there was nothing from which Respondent could then appeal. Respondent appealed from the denial of his double jeopardy motion the day after that judgment was entered in the docket of the state trial court. He did not even take the jurisdictional maximum time allowed, but appealed as soon as there was a judgment from which to appeal — which was after the second trial. (R. 14: doc. 16, Notice of Appeal)

In short, Petitioners assert as fact that a mistrial was granted by the state trial court, when the United States Court of Appeals for the Sixth Circuit, having considered Petitioners' arguments and having carefully and thoroughly interpreted the factual record, determined that the state court as a matter of fact acquitted Respondent of the felony charge at the first trial. (Sixth Circuit opinion, Petition at 8a, 811 F.2d at 957). In support of their argument, Petitioners belatedly rely upon the certificate of the state court trial judge, which the Sixth Circuit expressly found as a matter of fact was "in marked contrast to the proceedings recorded at the first trial," (Opinion, Petition at 8a, 811 F.2d at 957). The Sixth Circuit found that the trial court's post-trial certificate was

impermissible to vary the transcript of the proceedings and the record at the trial. This Court should not take issue with these factual determinations carefully made by the Sixth Circuit below.

REASONS THAT THE WRIT SHOULD BE DENIED

1. THE DECISION BELOW TURNS ON FACTS UNIQUE TO THE RECORD IN THIS CASE, AND NOT ON ANY NOVEL OR UNUSUAL LEGAL POSITION, AND THE SUPREME COURT SHOULD NOT REVIEW A DIFFICULT AND DISPUTED FACTUAL RECORD THAT OBVIOUSLY CREATED DISAGREEMENTS IN THE STATE AND FEDERAL COURTS BELOW.

Even were this Court inclined to believe that the Sixth Circuit erred in its interpretation of law, the Court ought to decline to exercise its discretionary jurisdiction in this case. Apart from the fact that the crime involved the theft of sixteen dollars of Christmas cards and that Respondent was incarcerated during the proceedings below for twenty-two days, the unusual and unique facts comprising the state trial court record in this case constitute a factual complex in which this Court should not attempt to clarify or formulate double jeopardy or other Constitutional principles. The decisions below at each stage, including in the Sixth Circuit, turn in large measure on factual questions requiring interpretation of the record and what actually took place in the state trial court. By virtue of one dissenting judge in the Ohio Court of Appeals, two dissenting judges in the Ohio Supreme Court, and one dissenting judge in the Sixth Circuit, this is not an unambiguous record upon which this Court should resolve dear and delicate Constitutional principles. The Court's discretionary jurisdiction should not be exercised to settle a factual dispute about the record.

There are no far-reaching consequences of the opinion below other than to resolve the questions arising from this peculiar record. The Sixth Circuit fully considered and disposed of all of Petitioners' arguments and denied rehearing and rehearing en banc. No novel or overriding interpretations of applicable double jeopardy or other Constitutional legal issues are involved, other than the factual issue, as even the Petition makes clear in its single-minded focus on the argu-

ment that the Sixth Circuit erred in its interpretation of the record, rather than in its interpretation of the controlling substantive authorities. The opinion below is factually specific and therefore lacks the importance in effect and implication that is necessary to justify the granting of the Petition. Even if the Sixth Circuit is wrong in its interpretation of the record, its decision will have no impact in other cases whose records are not likely to compare with the particular action of the state trial court in this case. Even if this Court believes that the legal issues below were wrongly decided, the Court should not resolve them in a case which turns on such a unique and troublesome state trial court record.

2. PETITIONERS HAVE OMITTED TO EXPLAIN ESSENTIAL FACTS IN THE RECORD BUT INSTEAD HAVE PRESENTED ONLY THOSE PORTIONS OF THE RECORD THAT SUPPORT THEIR ARGUMENT, AND THE SUPREME COURT SHOULD NOT GRANT CERTIORARI TO SETTLE A FACTUAL DISPUTE BETWEEN THE PARTIES ABOUT THE RECORD WHERE NO NOVEL LEGAL ISSUES ARE INVOLVED.

Petitioners have omitted pertinent citations to and quotations from the record, which the Supreme Court would have to analyze and interpret in considering this case on the merits. By their selective statement of the case, Petitioners raise inapposite issues. In suggesting that the first trial ended in a "mistrial", Petitioners' first question presented for review factually contradicts the findings of the state trial court, which granted a "new trial", and the findings of the Sixth Circuit, which thoroughly analyzed the record and determined that the trial did not end in a mistrial but an acquittal.

Petitioners' second question presented for review is inappropriate because it suggests that the state trial court could have and should have continued to a determination on a lesser included offense. The decision to terminate the trial in-

stead of proceeding on the misdemeanor was made by the state trial court, and if Petitioners dispute the result, their dispute is with the state trial court, from which they did not appeal.

The third question presented by the Petition simply ignores what the Sixth Circuit did. The Court of Appeals did not "reject findings of fact" made by the state court but, on the contrary, affirmed and followed them by concluding that the state court, whether correct or not, resolved issues of fact in favor of Respondent, thus requiring that the consequences of its ruling be an acquittal. *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 97 S. Ct. 1349 (1977).

This Court should not review the opinion below for the purpose of correcting the Sixth Circuit's evaluation of a state court's factual findings, even were it inclined to conclude that the Sixth Circuit erred. At most, the Court would conclude that the Sixth Circuit incorrectly interpreted the facts in the state court record, for essentially the dissenting judge below simply disagreed with the majority's analysis of that record and, instead, would have interpreted the record differently. Such factual analysis, although of critical importance to Respondent, in no way justifies a writ of certiorari.

3. THE DECISION BELOW IS NOT IN CONFLICT WITH ANY DECISON OF THIS COURT OR ANY OTHER CIRCUIT BUT ACCURATELY AND CORRECTLY APPLIES THE APPLICABLE LAW.

The Petition does not suggest a conflict between the opinion below and any decision of this Court or any other circuit, except in the Petition's interpretation of the facts and in its undying yet factually unsupported argument that a mistrial was granted. At most, the Sixth Circuit's decision is inconsistent with a decision of the Ohio Supreme Court in *State of Ohio* v. *Gerwin*, 69 Ohio St. 2d 488, 432 N.E. 2d 828 (1982), which was expressly questioned by the Sixth Circuit in its

opinion. (Petition at 6a-7a, fn.5, 811 F.2d at 956 fn.5). Indeed, the Petition's argument that the writ of habeas corpus was wrongly granted depends upon the Petition's assertion that the Sixth Circuit opinion below is in conflict with the law of Ohio.

While it may be true that the failure of the State to prove its case on the greater offense would not have prevented the trial from proceeding on the lesser included misdemeanor offense under certain circumstances, the state trial court affirmatively chose, even if erroneously, to terminate the trial and to dismiss the jury. Even if this were not an acquittal on the misdemeanor, the fatal and dispositive flaw in Petitioners' argument is that they made a conscious, deliberate choice not to appeal the court's judgment but instead chose to reprosecute Respondent for the enhanced felony offense, rather than to reprosecute him for the misdemeanor. Thus, he was twice prosecuted for the same felony theft offense, after an acquittal of the offense at the first trial, thus violating double jeopardy. The state is not permitted a second chance to prove what it first failed to prove. *Burks* v. *United States*, 437 U.S. 1, 98 S. Ct. 2141 (1978). As a result of the reprosecution, Respondent suffered actual imprisonment. The record below simply does not support the Petition's repeated assertions that the first state court prosecution was terminated by a mistrial granted at Petitioner's request. The Sixth Circuit found and ruled that there was no mistrial. Unlike the situation in *Morris* v. *Mathews*, 475 U.S. ____, 106 S. Ct. 1032 (1986), there was no guilty plea to a lesser offense and then a new prosecution for a greater offense. Here the prosecution, knowing that the prior conviction was uncounseled and that a prior counseled conviction could not possibly be proved, affirmatively chose to reprosecute Respondent for the very same felony theft offense after his first prosecution was terminated because of the State's inevitable failure to prove that essential element of the enhanced felony theft offense. That is the distinction ignored throughout the Petition.

CONCLUSIONS

The holding of the United States Court of Appeals for the Sixth Circuit is entirely consistent with decisions of this Court and turns upon a unique factual record created by Petitioners' conscious, deliberate decision to prosecute Respondent twice for the same enhanced felony theft offense, enhanced on the basis of a prior uncounseled conviction and after the trial court at the first trial had expressly determined that the state had failed to prove that essential element of the offense. Whether the state court was correct or not, the unique factual circumstances make this case one not deserving of discretionary review by this Court, despite the presence of very significant Constitutional principles. Petitioners do not raise substantial legal questions, but only factual issues as to what the record in the state court means and how the record should be interpreted in light of applicable law.

For these reasons, the Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

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April 1987

APPENDIX A

No. 86-3042

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RYAN HUNG-PING WANG,
Petitioner-Appellant,

v.

WILLIAM WITHWORTH, LINCOLN STOKES,
ANTHONY J. CELEBREZZE,
Respondent-Appellees.

Before; KEITH and WELLFORD, Circuit Judges, and PECK, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ John P. Hehman, Clerk

APPENDIX B

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellee,

vs.

RYAN HUNG PING WANG,
Defendant-Appellant.

APPEAL No. C-830287
TRIAL No. B-830233

OPINION
(Filed January 25, 1984)

Criminal Appeal from Court of Common Pleas
Judgment appealed from is: Affirmed
Date of Judgment entry on Appeal: January 25, 1984

Messrs. Arthur M. Ney, Jr. and William E. Breyer, 420 Hamilton County Courthouse, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Messrs. Taft, Stettinius & Hollister, Daniel J. Hoffheimer of counsel, 1800 First National Bank Center, Cincinnati, Ohio 45202, for Defendant-Appellant.

BLACK, J.

Two principal questions are raised by this case, under an indictment charging defendant-appellant Ryan Hung Ping Wang (Wang) with theft of fifteen greeting cards from Zayre's Corporation on December 3, 1982, when he had a prior conviction of petty theft on October 21, 1980. R.C.

2913.02[1] The prior conviction made the 1982 offense grand theft, a fourth degree felony. The first question is whether the state presented sufficient evidence to prove the prior conviction, when the evidence about it failed to disclose whether Wang was represented by counsel in 1980.

Two jury trials were held in 1983 on the charge of grand theft. The second principal question is whether the second 1983 trial violated Wang's constitutional right against double jeopardy, a question that depends on an analysis of the meaning and effect of the trial court's termination of the first 1983 trial. Did the court make a factual finding that the evidence was insufficient to support a conviction, or did it grant a mistrial by reason of overwhelmingly prejudicial evidence?

In brief, we hold that the evidence was sufficient to prove grand theft, that a mistrial was declared for good and sufficient reason and at Wang's request, and that the second 1983 trial did not violate the guarantee against double jeopardy.

I.

At the jury trial which began March 7, 1983, the state presented seven witnesses, two of whom had seen Wang take

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[1] R.C. 2913.02 reads in pertinent part:

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either:

(1) Without the consent of the owner or person authorized to give consent;

* * *

(B) Whoever violates this section is guilty of theft. If the value of the property or services stolen is less than one hundred fifty dollars, a violation of this section is petty theft, a misdemeanor of the first degree. If the value of the property or services stolen is one hundred fifty dollars or more, or if the property stolen is any of the property listed in section 2913.71 of the Revised Code, or *if the offender has previously been convicted of a theft offense, a violation of this section is grand theft, a felony of the fourth degree.* If the property stolen is a motor vehicle, as defined in section 4501.01 of the Revised Code, a violation of this section is grand theft of a motor vehicle, a felony of the third degree. (Emphasis added.)

the greeting cards from Zayre's rack, place them under the back of his pants belt, pull his jacket over them and leave the store without paying for them. The other five witnesses testified about Wang's 1980 conviction for petty theft and identified him as the offender in that proceeding, by personal recognition, fingerprints and mug shot. A certified copy of that prior conviction was presented and accepted in evidence, which disclosed that on October 21, 1980, Wang pled guilty to a charge of petty theft and was fined $50 and costs. The evidence about this prior conviction, however, failed to indicate whether or not Wang was represented by, or duly waived, counsel; there simply was no evidence about counsel.

At the close of the state's case, Wang made two motions. The first was a motion for acquittal under Crim. R. 29(A), in support of which Wang claimed that he should be acquitted, because the evidence failed to establish a valid prior conviction. Citing *Burgett* v. *Texas* (1967), 389 U.S. 109, 88 S. Ct. 258, and *Baldasar* v. *Illinois* (1980), 446 U.S. 222, 100 S. Ct. 1585, defense counsel asserted that the state had the burden to prove that Wang's rights to counsel were not violated, and that the failure to do so meant that the enhancing element of a prior conviction was not proved. The second motion was offered as an alternative. Wang moved for a mistrial on the grounds that a fair trial could not be had because so many witnesses had testified about the prior conviction that the jury could not be effectively instructed to limit its use of that evidence. The court denied both defense motions.

The defense then rested without presenting any evidence and immediately renewed both motions. The court expounded on them, seeming at one point to acknowledge that there was a problem about the validity of the prior conviction, and at another point, that the amount of evidence about it was so prejudicial to defendant, without taking into consideration the sufficiency of the evidence to establish the prior conviction, that the jury was "misdirected" and no corrective instruction could cure that prejudice. Although not so stating,

the court seemed to have Evid. R. 403(B)[2] in mind. The court then said:

> I am going to deny your motion for Rule 29(B) (*sic*), but in the alternative grant a motion for a new trial (*sic*). We will set it as soon as possible. If you gentlemen will check your calendars. How about 9:00 o'clock on April 23rd? If you will present an entry granting your motion for new trial, please.

The entry subsequently journalized by the court[3] first denied the two defense motions as made at the close of the state's case and then went on:

> This cause came on further to be heard upon Defendant Ryan Hung-Ping Wang's Motion for Acquittal pursuant to Ohio Criminal Rule 29(A) and alternative Motion for New Trial, both made and reasserted at the close of all of the evidence. Having considered all evidence properly before the Court and the arguments of counsel, the Court finds that the admission of evidence offered against Defendant relating to the alleged prior conviction may have prejudiced him and may have misdirected

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[2] Evid. R. 403(B) reads:

> Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.
>
> * * *
>
> (B) Exclusion discretionary.
>
> Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.

[3] For undisclosed reasons, this entry was not journalized until three weeks after the court ruled orally on the motions, but in the absence of any claim of error, we ignore the aberration.

Defense counsel clearly moved for a mistrial but the court called it a motion for a "new trial" without, however, designating the "cause" upon which the motion was grounded. *See* Crim. R. 33(A). As explained below, we believe the mistrial designation was correct.

the jury to the prejudice of Defendant. The Court further finds that it affirmatively appears from the entire record that Defendant was prejudiced by the testimony of witnesses and by the evidence offered against him relating to the alleged prior conviction and was prevented from having a fair trial, there being nothing in the evidence before the Court to show that Defendant had an attorney or that he knowingly and voluntarily waived his right to counsel at the time of the alleged prior conviction. Therefore,

IT IS FURTHER ORDERED that Defendant's Motion for Judgment of Acquittal made at the close of all of the evidence be denied; and

IT IS FURTHER ORDERED that Defendant's Motion for New Trial made at the close of all of the evidence be granted.

The case came on for a second trial at an earlier date (March 23, 1983) than anticipated, but only after counsel had filed in writing a renewed motion for judgment of acquittal and a motion to dismiss for double jeopardy. These were both denied by the trial judge,[4] who caused the case to be transferred to a visiting judge for trial. In this second 1983 trial, which was also before a jury, the motions for acquittal and dismissal were renewed but not ruled on by the visiting judge, who deferred to the rulings of the initial judge. In his introductory remarks to the jury, the visiting judge stated that the charge was theft with a prior conviction of theft, but that was the last mention about the prior conviction. It was never referred to again, either in opening statements, the evidence,

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[4] The overruling of a motion to dimiss on grounds of double jeopardy is a final appealable order under R.C. 2953.02 and 2505.02. *State* v. *Thomas* (1980), 61 Ohio St. 254, 400 N.E.2d 897. No claim is made by the state that the only appeal from such an order must be filed within thirty days of the date of entry of that order, under App. R. 4(B). For purposes of disposing of this appeal, we do not raise any question *sua sponte* about the timeliness of the notice of appeal. In any event, defendant could have filed a motion to leave to appeal under App. R. 5(A).

closing arguments, or the final instructions of the court. The jury found Wang guilty of petty theft; he was sentenced to thirty days and ordered to pay a fine of $200 and costs.[5]

II.

Wang presents two assignments of error,[6] in which we find, upon analysis, three separate claims: error in overruling his motion to acquit under Crim. R. 29; error in overruling his motion to dismiss for double jeopardy; and error in allowing a reprosecution that was vindictive and retaliatory. We will discuss these claims in that order.

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[5] Wang is a Chinese national and an alien subject to deportation on order of the Attorney General of the United States after conviction of two crimes involving moral turpitude. This threat gives the impetus to Wang's defense.

[6] Wang's two assignments of error read as follows:

FIRST ASSIGNMENT OF ERROR

The Trial Court committed prejudicial error by (1) overruling Defendant-Appellant's Motion to Acquit made at the close of the state's case and at the close of all the evidence, and (2) by overruling Defendant-Appellant's Renewed Motion to Acquit and to Dismiss the indictment for double jeopardy made before the second trial, at the close of the state's case, and at the close of all the evidence because the state had failed to prove an essential element of the offense charged in the indictment—a prior, counseled conviction. Therefore, reprosecution of Defendant-Appellant upon that felony indictment and for the same offense violated the prohibiton against double jeopardy in the Fifth Amendment of the U.S. Constitution and in Article I, Section 10 of the Ohio Constitution. (T.d. 42. T.d. 33, T.p. 162, 2T.p. 4-5, 3T.p. 168a-168b, 169-70).

SECOND ASSIGNMENT OF ERROR

Reprosecution of Defendant-Appellant on the felony indictment, after the trial court had granted Defendant-Appellant's Motion For a Mistrial based on the state's failure to prove an esential element of the indicted offense, violated Defendant-Appellant's constitutional right to due process of law under the Fifth and Fourteenth Amendments of the U.S. Constitution and Article 1, Section 10 of the Ohio Constitution. (T.d. 33, T.d. 36, T.d. 42; 2T.p. 1-5, 7, 17, 35, 3T.p. 168-a-68b, 210-11, 4T.p. 1-82).

For the reasons set forth in the Opinions, we find no merit in either.

III.

Wang's claim that he was entitled to an acquittal at the conclusion of the first 1983 trial is without merit.[7] We hold that the evidence was sufficient to establish a constitutionally valid prior conviction, for two reasons. First, we believe that because no imprisonment, probation or other restriction on Wang's liberty was imposed in the 1980 conviction, it can be used to enhance the penalty for the 1983 conviction, even though Wang may not have had counsel in the 1980 proceedings. At that earlier time, no imprisonment was imposed, only a fine of $50 and costs. Under *Scott* v. *Illinois* (1979), 440 U.S. 367, 99 S. Ct. 1158, that penalty was constitutional despite the absence of counsel. Because that proceeding was constitutionally valid, we believe it can be used to enhance the penalty for his later theft. In our opinion, *Baldasar* does not prevent that use, because as we read that case, it was the deprivation of Baldasar's liberty in the prior conviction that made it unavailable to enhance the penalty in the subsequent conviction. Baldasar had been "sentenced to one year of probation," which in itself impinged on his liberty, and it is fair to assume that if Baldasar had broken any condition of his probation, he would have been subject to incarceration. On the other hand, where the prior conviction does not result in

[7] Obviously, if the evidence about the enhancing element had been wholly negative under any theory, Wang could still have been found guilty of the lesser included offense of petty theft. Crim. R. 31(C); R.C. 2945.74. Furthermore, there is a line of cases holding that when the first trial is inconclusive about guilt of a lesser included offense, even though not separately charged, a second trial on that offense only is not prohibited by the double jeopardy clause, assuming a clear acquittal of the greater offense. *Stone* v. *Superior Court of San Diego County* (1982), 31 Cal. 3d 503, 183 Cal. Rptr. 647, 646 P.2d 809; *State* v. *Pugliese* (N.H. 1980), 422, A.2d 1319; *Fierro* v. *State* (Tex. App. 1982), 626 S.W.2d 597; *State* v. *Davidson*, No. C-820647 (1st Dist. June 22, 1983). The question of double jeopardy arises in the instant case because Wang was brought to the second 1983 trial for grand theft as set forth in the indictment, not for the reduced charge of petty theft. If Wang had, in effect, been acquitted of grand theft, in the first trial, he could not be brought to trial again on that same charge. *Green* v. *United States* (1959), 355 U.S. 184, 78 S. Ct. 221.

any deprivation of liberty, as in Wang's 1980 conviction, it can be used to enhance the penalty in a subsequent offense.

Second, assuming *arguendo* that contrary to our interpretation of *Baldasar*, a prior conviction cannot be used to enhance a subsequent offense, if the defendant was unrepresented by counsel and did not waive counsel, irrespective of the penalty imposed in that prior conviction, we believe that the state of the instant case did not require a factual finding that in 1980 Wang was "uncounseled" (a word we use to mean that he did not waive, and was not represented by, counsel). Both the record and Wang were silent about whether he was counseled in 1980; Wang offered no evidence of any nature about this aspect of those proceedings. The question is who has the burden of proving compliance or noncompliance with the constitutional requirement of counsel, in these circumstances. The point is not decided in *Baldasar*, because that record indicated he was uncounseled. We find no reported case on the point in Ohio.

We believe that in these circumstances, it is fair to place on the defendant the burden of going forward with evidence of the consitutional violation, once the state has proved the existence of the prior conviction and the defendant's identification as the convicted person. The matter of representation is peculiarly within the defendant's knowledge and he can fairly be required to adduce evidence about them, as he would for any affirmative defense under R.C. 2901.05(C). It would be illogical, in our judgment, to place on the state the initial burden of proving, in the face of the silent record and a silent defendant, that all of his constitutional rights were observed and protected in a prior conviction used to enhance a current penalty. That would eliminate the presumption of the regularity of judicial proceedings and the doctrine of *res judicata;* it would require an unnecessary and burdensome review of the details of the prior proceeding. We find nothing in Ohio law, and particularly in R.C. 2945.75, that requires more than proof of the prior conviction by certified copy and the defendant's identification. If there was a constitutional violation in the earlier proceeding, the defendant will have

ample opportunity to come forward with his evidence. We find our ruling on the burden of going forward conforms with the weight of authority from other states.[8]

We hold that the trial court did not err in overruling Wang's three motions to acquit under Crim. R. 29, being the one made at the close of the state's case in the first 1983 trial, the one made at the close of all the evidence in that trial, and the written one made after the first jury was discharged and before the second trial began.

IV.

Wang's contention that the trial court erred in overruling his motion to dismiss the indictment on the grounds of double jeopardy requires an analysis of the meaning and effect of the trial court's orders at the end of the first 1983 trial. In Part I we reviewed these actions in detail. Wang argues that in effect, the court made an evidentiary finding that the state had failed to prove the 1980 conviction was constitutionally valid

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[8] The following cases hold either that the defendant cannot prevail by remaining silent about a silent record even though it appears to be invalid, or that the defendant has a burden affirmatively to come forward with his evidence about invalidity once the state has demonstrated the existence of the conviction and defendant's identity as the convicted person: *People* v. *Quintana* (Colo. 1981, 634 P.2d 413; *Collins* v. *State* (Ind. 1981), 415 N.E.2d 46; *State* v. *Garcia* (1979), 92 N.M. 730, 594 P.2d 1186; *Chancy* v. *State* (Tex. Cr. App. 1981), 614 S.W.2d 446; *State* v. *Aunino* (1980), 46 Or. App. 734, 613 P.2d 84; *Bell* v. *Commonwealth* (Ky. App. 1978), 566 S.W.2d 785. *Contra*, *Cohen* v. *State* (Nev. 1981), 625 P.2d 1170. We also note an indirect hint that the Ohio Supreme Court will impose on defendant at least the burden of going forward with evidence of a claimed constitutional violation in the face of a silent record. In *State* v. *Gerwin* (1982), 69 Ohio St. 488, 491, 432 N.E.2d 828, 830, the Court held that when no imprisonment was imposed in the subsequent trial, it was not necessary for defendant to have been represented by counsel at the prior conviction. The Court's "second" reason was that the record did not indicate that the defendant was indigent or financially unable to obtain counsel in the prior conviction. This appears to require the defendant to go forward with evidence when the prior record is silent on the point.

even though the motions to acquit were overruled, and that by reason of this finding Wang could not be tried again under the indictment. It is true that the substantive effect of a court order controls, and that for double jeopardy purposes, neither the technical terms of an order nor the court's own characterization of its order is determinative. *Lee* v. *United States* (1977) 432 U.S. 23, 97 S. Ct. 2141; *United States* v. *Sisson* (1970), 399 U.S. 267, 90 S. Ct. 2117. Even if the evidentiary ruling acquitting the defendant is made on erroneous legal conclusions, an acquittal will bar subsequent prosecution. *Sanabria* v. *United States* (1978), 437 U.S. 54, 98 S. Ct. 2170. Wang contends the trial court in effect acquitted him of the charge in the indictment, pointing to the phrase in the court's order which reads, "there being nothing in the evidence before the Court to show that Defendant had an attorney or that he knowingly and voluntarily waived his right to counsel at the time of the alleged prior conviction."

The state opposes these contentions, claiming that the trial court refused to acquit Wang and then declared a mistrial on Wang's own request, before any issue of fact was determined by the court or the jury. The state's argument is that no evidentiary conclusion about the validity of the prior conviction was reached, because the record was silent about Wang's counsel and the defendant had not carried his burden to demonstrate constitutional violations, and that the mistrial (denominated "new trial") was granted because the evidence about the prior conviction, although relevant, was needlessly cumulative. Evid. R. 403(B).

We are persuaded that the state's argument prevails. The trial court's oral discussion of the state of the evidence at the conclusion of the first 1983 trial and its entry both appear to treat the absence of evidence about Wang's counsel in the 1980 proceedings as a deficiency in the state's case, and this introduces an element of doubt and confusion about what the court was thinking. Nevertheless, we believe the substantive effect of the court's action was not to acquit Wang but to declare a mistrial, at Wang's request and for good and proper reasons. Three times the court overruled Wang's motions to

acquit. Thus, there was no "resolution, correct or not, of some or all of the factual elements of the offense charged," this quoted phrase being the Supreme Court's definition of an "acquittal" found in *United States* v. *Martin Linen Supply Company* (1977) 430 U.S. 564, 571, 97 S. Ct. 1349, 1355. We find no conclusive ruling on the evidence in the record. On the other hand, the court ordered a "new trial," stating its reason as being that the prejudicial evidence was so overwhelming that it could not effectively be eliminated from the jury's consideration. The court's order clearly contemplated a new trial on the offense as charged and not a termination of all prosecution; it was functionally indistinguishable from a declaration of mistrial. *Lee* v. *United States, supra* at 30, 97 S. Ct. at 2145. Furthermore, this action was taken at Wang's own request, *Id.* at 31, 97 S. Ct. at 2146; *United States* v. *Dinitz* (1976), 424 U.S. 600, 96 S. Ct. 1075, and under circumstances that manifested a necessity to discontinue the first trial in the interest of justice. *Wade* v. *Hunter* (1949), 336 U.S. 684, 69 S. Ct. 834. The trial court did not abuse its discretion in so doing. *Compare United States* v. *Jorn* (1971), 400 U.S. 470, 91 S. Ct. 547.

We hold that the effect of the trial court's orders at the conclusion of the first 1983 trial was to reject Wang's motions to acquit and to make a valid declaration of a mistrial. No error was committed in overruling Wang's motion to dismiss the indictment on grounds of double jeopardy.

V.

Wang' second assignment of error contains his third claim: that his reprosecution in the second 1983 trial was presumptively and in fact vindictive, and a violation of his rights to due process. We find no merit in this assignment for two reasons, either one of which is dispositive. First, the claimed error was not brought to the attention of the trial court by motion, objection or otherwise; indeed, it could not have been, because Wang's present argument is that the claimed vindictiveness is mainly evidenced by a series of post-

conviction actions. Not having been raised before the trial court when the error, if any, could have been voided or corrected, it is waived. *State* v. *Williams* (1977), 51 Ohio St. 2d 112, 364 N.E. 2d 1364. Second, the claim has no basis of fact because the claimed misconduct of the prosecution, in its separate parts and in its cumulative whole, constitutes nothing more than aggressive and vigorous prosecution of an indicted offense. We do not find in the record any attempt to "punish" Wang for exercising his guaranteed rights. *United States* v. *Goodwin* (1982), 457 U.S. 368, 102 S. Ct. 2485; *Bordenkircher* v. *Hayes* (1978), 434 U.S. 357, 98 S. Ct. 663.

We affirm.

KEEFE, J., concurs.

PALMER, P.J., dissents.

PALMER, P.J., Dissenting.

I quarrel with only one portion of my brother Black's otherwise lucid and persuasive analysis of a case about which it might truly be said that:

"Confusion now hath made his masterpiece!" MacBeth II, iii, 72.

I agree completely with the majority in finding meritless those aspects of the assignments of error directed to the overruling of the Crim. R. 29 motion, and to a "vindictive and retaliatory" reprosecution; I find I cannot concur in the majority's disposition of the double jeopardy issue as set forth in Part IV of Judge Black's Opinion, and therefore dissent.

To put the matter in its simplest form, if the trial court aborted the instant proceedings because he concluded that prejudice resulted from an overenthusiastic array of witnesses testifying for the state about the defendant's prior conviction, a retrial could be had without prejudice to the defendant's constitutional rights. *See United States* v. *Martin Linen Supply Co.* (1977), 430 U.S. 564, 97 S. Ct. 1349. If, on the other hand, proceedings were terminated because the trial court agreed with the defendant that the state had failed to

prove that the defendant had the benefit of or had waived counsel at the time of the prior conviction, and that the prior conviction was therefore a nullity, then the defendant could not constitutionally be retried — as he was — for the same offense. *See United States* v. *Martin Linen Supply Co., supra.* Moreover, the double jeopardy bar would subsist whether or not the trial court was legally correct in concluding that the state had failed in some aspect of its burden of proof. *See Sanabria* v. *United States* (1978), 437 U.S. 54, 98 S. Ct. 2170. We are not, therefore, here to pass judgment on the *correctness* of such a ruling, but rather, only on whether such a judgment was in fact made. If so, and irrespective of what words or terms the trial court chose to apply or misapply to it, whether "acquittal," "mistrial," or the wholly inappropriate term actually chosen, "new trial," the substantive effect of the order would bar a second prosecution.

With so much of an analysis, I take it the majority would not disagree. But there is an additional point undiscussed by the majority which seems to me to require articulation: I take it that if the trial court terminated the trial for *both* reasons, *i.e.*, because he concluded both prejudice in the number of witnesses *and* because he concluded, rightly or wrongly, that the state failed to prove the enhancing element of a constitutionally valid prior conviction, the defendant's position became one of jeopardy and he could not thereafter be tried for the same offense. *See United States* v. *Martin Linen Supply Co., supra.* The state cannot be permitted to sort among a variety of causes for termination, some requiring jeopardy to attach and others not, in order to select and rely on that cause which would not inhibit a retrial of the defendant. I emphasize this because my reading of the record, confusing at times as that document is, leads me to conclude that this quite probably was what was in the trial court's mind when he aborted the proceedings in question.

There are, essentially two sources for my above conclusion. One, the judgment entry granting the "new trial," faithfully reproduced on page four of the majority Opinion, and the second consisting of the ruminations of the court, following

an oral renewal of the defendant's motions for acquittal and for a mistrial at the conclusion of the case. These remarks, as reproduced at pp. 161-164 of the transcript of proceedings, are set out in the Appendix following, along with a copy of the judgment entry in question. Both sources require careful reading to sort out obvious instances of what we might generously call terminological inexactitude. Both nevertheless indicate to me, at least, a very clear conclusion drawn by the trial court that the state's case suffered from *two* fatal impediments.

The first and principal perceived defect was that drawn from the court's reading of *Baldasar* v. *Illinois* (1980), 446 U.S. 222, 100 S. Ct. 1585, which it felt was "right on point [with the case] which is before the court today." T.p. 161. The record, said the trial court:

> would indicate to me that there was no representation by a lawyer or that there was no formal waiving of any right to any attorney. We run into a classic Fifth and Sixth Amendment rights in this particular case. *Baldasar*, and going all the way back to *Gideon* v. *Wainwright*, the right of counsel through the 14th Amendment, *and this being a specific element of the particular charge before the Court* and there being nothing in the evidence before the Court by virtue of State's Exhibit Number 4, the prior conviction, to show that he had an attorney, or that there was a waiver of right to counsel, puts the Court between a rock and a hard place. *What I have to do is I have to decide whether or not there is any way I can admonish the jury that they would disregard all of that testimony with regard to that prior conviction and arrive at a fair and just verdict* (emphasis added).

T.p. 162. The trial court then continues for the next few pages to conclude that because of the fact that six of the eight state's witnesses gave testimony relating solely to that prior conviction, the trial court could not effectively wipe the testimony from their minds and leave anything of value upon

which to deliberate. It is unclear whether the trial court meant *also* to indicate that the very number of witnesses to the prior conviction furnished an *independent* basis of prejudice, but we will assume it to be so.

Remembering that we are not concerned at this point with whether the trial court was *correct* in his application of Baldasar (he was not), *but only the substantive effect of his ruling*, it is inescapable to me that the primary, if not the only, basis for the trial court's termination of the trial lay in his reading of *Baldasar* and its perceived impact on the evidence of the prior conviction, destroying that "specific element" of the charge, as the trial court would put it. If I read this properly, then demonstrably there was a "resolution, correct or not, of some or all of the factual elements of the offense charged," requiring an acquittal. *See United States* v. *Martin Linen Supply Co.*, *supra* at 571, 430 S. Ct. at 1355. Jeopardy, under such circumstances, ensues as a matter of course.

This reading of the trial court's thinking is buttressed by the language of the judgment entry, which is, to me at least, quite unequivocal. Thus:

> *The Court further finds* that it affirmatively appears from the entire record that Defendant was prejudiced by the testimony of witnesses *and by the evidence offered against him relating to the alleged prior conviction and was prevented from having a fair trial, there being nothing in the evidence before the Court to show that Defendant had an attorney or that he knowingly and voluntarily waived his right to counsel at the time of the alleged prior conviction* (emphasis added).

T.d. 42. Again, if it is true that the trial court found an *independent* source of prejudice in the number of witnesses offered by the state on the prior conviction issue — which is arguable but which I am perfectly content to concede — he certainly found the existence of a second critical deficiency in the state's evidence with respect to the prior conviction

resulting from a perceived failure of proof as to its constitutional prerequisites. So I can only read the relevant material.

The majority asks, in effect, that if this was so, why then did not the court grant the appropriate remedy for such a fundamental defect in proof, the motion to acquit, rather than granting a "new trial," or, translating it to more appropriate terms, a mistrial? There is simply no satisfactory answer to this, unless one wishes to conjecture along the lines suggested by footnote seven of the majority Opinion. My own conclusion would reject this legally satisfactory but overly ingenious approach. I believe that the trial court quite simply selected the wrong remedy (mistrial instead of acquittal, or, alternatively, a reduction to the lesser included offense of petty theft) for the wrong reason (see Part III of the majority Opinion), giving it in the process a wrong name (new trial). The result of this unfortunate concatenation of errors was the attachment of jeopardy to the defendant.

I would, therefore, reverse and discharge.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

APPENDIX
[TO OHIO COURT OF APPEALS OPINION]

MR. HOFFHEIMER: Your Honor, at this time the defense will reassert its motion for acquittal and motion for mistrial.

THE COURT: Without going over that which you have already emphasized, do you have anything to add?

MR. HOFFHEIMER: I don't believe there's anything further to add unless the Court has further questions.

MR. GRONEMAN: Nothing, your Honor.

THE COURT: Now we are in a different posture. The problems I think are obvious to us all, especially when one takes into consideration the evidence which is before the Court at this time and the Supreme Court's ruling on the Baldasar Case. I think the Loper Case can be differentiated from the Baldasar Case wherein that case there's a suggestion of an impeachment of credibility by virtue of a prior conviction. It is not the same case which is right on point which is before the Court today, which is decided in Baldasar, the 1980 case.

The record in this particular case, it would indicate to me that there was no representation by a lawyer or that there was no formal waiving of any right to any attorney. We run into a classic Fifth and Sixth Amendment rights in this particular case. Baldasar, and going all the way back to Gideon vs. Wainwright, the right of counsel through the 14th Amendment, and this being a specific element of the particular charge before the Court and there being nothing in the evidence before the Court by virtue of State's Exhibit Number 4, the prior conviction, to show that he had an attorney, or that there was a waiver of right to counsel, puts the Court between a rock and a hard spot. What I have to do is I have to decide whether or not there is any way I can admonish the jury that they would disregard all of that testimony with regard to that prior conviction and arrive at a fair and just verdict.

Since six of the eight witnesses who have testified on behalf of the State testified solely on the basis of the prior conviction

and added nothing to the testimony with regards to the merits of the charge as it would be without that prior conviction, if asked, overwhelmingly weigh the evidence as presented to the jury, is solely based upon that incident in 1980.

If the defendant had taken the stand I could have given them a limiting charge. I still don't know if that limiting charge would have rectified the record with regard to keeping the record in a position where the defendant was not prejudiced or keeping the jury in a position where the jury was not prejudiced by the introduction of that testimony.

With regard to your motion for a new trial which you referred to as a motion for a mistrial, I do believe that the admission of the evidence which was offered against the defendant obviously is prejudiced towards his rights in this particular case. I believe the jury had been misdirected and that misdirection has caused prejudice.

I am not disparaging the prosecution. I know you presented the case in the only manner you could have. I believe from the evidence that the defendant was prejudiced, thereby, and prevented from having a fair trial. On that basis I am going to grant a motion for a new trial, and we will set it.

I am going to deny your motion for Rule 29 (B), but in the alternative grant a motion for a new trial. We will set it as soon as possible. If you gentlemen will check your calendars. How about 9:00 o'clock on April 23rd? If you will present an entry granting your motion for new trial, please.

(Whereupon, the proceedings were concluded.)

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. B830233
(Judge Schott)

STATE OF OHIO,

Plaintiff,

vs.

RYAN HUNG-PING WANG
2567 Erie Avenue
Cincinnati, Ohio 45202,

Defendant.

JUDGMENT ENTRY

(Entered April 14, 1983)

This cause came on to be heard upon Defendant Ryan Hung-Ping Wang's Motion for Judgment of Acquittal pursuant to Ohio Criminal Rule 29(A) and alternative Motion for New Trial, both made at the close of the State's case. Having considered all evidence properly before the Court and the arguments of counsel,

IT IS ORDERED that Defendant's Motion for Acquittal and alternative Motion for New Trial, both made at the close of the State's case, be denied.

This cause came on further to be heard upon Defendant Ryan-Hung-Ping Wang's Motion for Acquittal pursuant to Ohio Criminal Rule 29(A) and alternative Motion for New Trial, both made and reasserted at the close of all of the evidence. Having considered all evidence properly before the Court and the arguments of counsel, the Court finds that the admission of evidence offered against Defendant relating to the alleged prior conviction may have prejudiced him and may have misdirected the jury to the prejudice of Defendant. The Court further finds that it affirmatively appears from the

entire record that Defendant was prejudiced by the testimony of witnesses and by the evidence offered against him relating to the alleged prior conviction and was prevented from having a fair trial, there being nothing in the evidence before the Court to show that Defendant had an attorney or that he knowingly and voluntarily waived his right to counsel at the time of the alleged prior conviction. Therefore,

IT IS FURTHER ORDERED that Defendant's Motion for Judgment of Acquittal made at the close of all of the evidence be denied; and

IT IS FURTHER ORDERED that Defendant's Motion for New Trial made at the close of all of the evidence be granted.

IT IS SO ORDERED.

/s/ JUDGE SCHOTT
Judge, Court of Common Pleas,
Hamilton County, Ohio
Nunc pro Tunc 3-9-83

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CERTIFICATE OF SERVICE

I certify that all parties required to be served have been served in that I served three copies of the foregoing Respondent's Brief In Opposition upon Arthur M. Ney, Jr., Esquire, Prosecuting Attorney of Hamilton County, Ohio, by mailing them in a U.S. mailbox to William E. Breyer, Esquire, Assistant Prosecuting Attorney, 420 Hamilton County Courthouse, 1000 Main Street, Court and Main Streets, Cincinnati, Ohio 45202, and I served three copies upon Anthony J. Celebrezze, Jr., Esquire, Attorney General of Ohio, by mailing them in a U.S. mailbox to William J. Steele, Esquire, Assistant Attorney General, State Office Tower, 26th floor, 30 East Broad St., Columbus, Ohio 43215, by first class U.S. mail, postage prepaid, this ____ day of April 1987.

DANIEL J. HOFFHEIMER